IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN ITS INSOLVENCY JURISDICTION

NOTICE OF MOTION NO.198 OF 2006
IN
PETITION NO.74 OF 2001

Re: Mahendra H. Mahtani ..Insolvent.
Ex-parte :
ICDS Limited .. Petitioning Creditor.
And
The Official Assignee ..Respondent.

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Mr. Amol Sakpal i/b Mr. G.R. Mehta for the Petitioning Creditor.
Ms. K.A. Shah for the Insolvent.
Mr. Y.C. Parikh, Official Assignee present.

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CORAM: DR. D.Y. CHANDRACHUD, J.

19th December, 2006.

P.C. :

The Insolvency Notice was based on an arbitral award dated 24th October, 1997. A Notice of Motion was taken out to set aside the Insolvency Notice which came to be dismissed on 18th September, 2001. Thereupon an insolvency petition was filed in which Consent Terms were taken on record on 3rd September, 2002. Upon default in the payment of the installments due thereunder, an order of adjudication ensued on 30th August, 2003. In **Paramjeet Singh Patheja v. I. C. D. S. Limited** (Civil Appeal

4130 of 2006), the Supreme Court has in a decision delivered on 31st October, 2006 held thus :

> "i)that no insolvency notice can be issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an Arbitration Award;
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> ii) that execution proceedings in respect of the award cannot be proceeded with in view of the statutory stay under Section 22 of the SICA Act. As such, no insolvency notice is liable to be issued against the appellant.
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> iii)Insolvency Notice cannot be issued on an Arbitration Award.
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> iv)An arbitration award is neither a decree nor an Order for payment within the meaning of Section 9(2). The expression "decree" in the Court Fees Act, 1870 is liable to be construed with reference to its definition in the CPC and held that there are essential conditions for a "decree".
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> (a) that the adjudication must be given in a suit.
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> (b) That the suit must start with a plaint and culminate in a decree, and
>
> (c) That the adjudication must be formal and final and must be given by a civil or revenue court. An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the institution of a plaint.
>
> v) A legal fiction ought not to be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration Act, 1996 cannot be construed to be a "decree" for the purpose of Section 9

(2) of the Insolvency Act.

vi) An insolvency notice should be in strict compliance with the requirements in Section 9(3) and the Rules made thereunder.

vii) It is a well established rule that a provision must be construed in a manner which would give effect to its purpose and to cure the mischief in the light of which it was enacted. The object of Section 22, in protecting guarantors from legal proceedings pending a reference to BIFR of the principal debtor, is to ensure that a scheme for rehabilitation would not be defeated by isolated proceedings adopted against the guarantors of a sick company. To achieve that purpose, it is imperative that the expression "suit" in Section 22 be given its plain meaning, namely any proceedings adopted for realization of a right vested in a party by law. This would clearly include arbitration proceedings.

viii) In any event, award which is incapable of execution and cannot form the basis of an insolvency notice."

The judgment of the Supreme Court holds that an insolvency notice issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909 cannot be sustained on the basis of an arbitral award which has been passed under the Arbitration & Conciliation Act, 1996.

In paragraph 5 of the affidavit in support it has been

stated that the entire claim of the Petitioning Creditor has been duly paid by settling the amount at Rs.44 lacs. Similarly in paragraph 7 it has been stated that no other claims have been lodged with the Official Assignee and that there are no other creditors. The Assignee states that the schedule of assets and liabilities has also been filed. In these circumstances, having regard to the judgment of the Supreme Court in **Paramjeet Singh Patheja**'s case, an order of annulment as prayed will have to be passed. The Motion is made absolute in terms of prayer clauses (a), (c) and (d).